

# PART 37

## SERVICE CONTRACTING

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### 37.106 Funding and term of service contracts.

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#### *FAR as of FAC 90-25*

When contracts for services are funded by annual appropriations, the term of contracts so funded shall not extend beyond the end of the fiscal year of the appropriation except when authorized by law (see 32.703-2 for contracts conditioned upon availability of funds and 32.703-3 for contracts crossing fiscal years).

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#### *FAR as revised*

(a) When contracts for services are funded by annual appropriations, the term of contracts so funded shall not extend beyond the end of the fiscal year of the appropriation except when authorized by law (see **paragraph (b) of this section for certain service contracts**, 32.703-2 for contracts conditioned upon availability of funds, and 32.703-3 for contracts crossing fiscal years).

(b) **41 U.S.C. 253I, as amended by Section 1073 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355), authorizes the head of any executive agency except the Department of Defense, United States Coast Guard, and the National Aeronautics and Space Administration (41 U.S.C. 252(a)(1)), to enter into a basic contract, options, or orders under that contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the basic contract, options or orders under that contract does not exceed one year each. Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority (see 32.703-3(b)). Consult agency supplements for similar authorities that may exist for the Department of Defense, United States Coast Guard, or the National Aeronautics and Space Administration. [FAC 90-30]**

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### 37.113 Severance payments to foreign nationals. [Section added by FAC 90-31]

#### 37.113-1 Waiver of cost allowability limitations.

(a) The head of any agency, or designee, may waive the 31.205-6(g)(3) cost allowability limitations on severance payments to foreign nationals for contracts that—

- (1) Provide significant support services for (i) members of the armed forces stationed or deployed outside the United States, or (ii) employees of an executive agency posted outside the United States; and
- (2) Will be performed in whole or in part outside the United States.
- (b) Waivers can be granted only before contract award.
- (c) Waivers cannot be granted for—
  - (1) Military banking contracts, which are covered by 10 U.S.C. 2324(e)(2); or
  - (2) Severance payments made by a contractor to a foreign national employed by the contractor under a DOD service contract in the Republic of the Philippines, if the discontinuation of the foreign national is the result of the termination of basing rights of the United States military in the Republic of the Philippines (section 1351(b) of Public Law 102-484, 10 U.S.C. 1592, note).

**37.113-2 Solicitation provision and contract clause.**

(a) Use the provision at 52.237-8, Restriction on Severance Payments to Foreign Nationals, in all solicitations that meet the criteria in 37.113-1(a), except for those excluded by 37.113-1(c).

(b) When the head of an agency, or designee, has granted a waiver pursuant to 37.113-1, use the clause at 52.237-9, Waiver of Limitation on Severance Payments to Foreign Nationals.

**52.237-8 Restriction on Severance Payments to Foreign Nationals.**

As prescribed in 37.113-2(a), use the following provision:

**RESTRICTION ON SEVERANCE PAYMENTS  
TO FOREIGN NATIONALS (OCT 1995)**

(a) The Federal Acquisition Regulation (FAR), at 31.205-6(g)(3), limits the cost allowability of severance payments to foreign nationals employed under a service contract performed outside the United States unless the head of the agency, or designee, grants a waiver pursuant to FAR 37.113-1 before contract award.

(b) In making the determination concerning the granting of a waiver, the head of the agency, or designee, will determine that—

(1) The application of the severance pay limitations to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for (i) members of the armed forces stationed or deployed outside the United States, or (ii) employees of an executive agency posted outside the United States;

(2) The Contractor has taken (or has established plans to take) appropriate actions within its control to minimize the amount and number of incidents of the payment of severance pay to employees under the contract who are foreign nationals; and

(3) The payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract, or is necessary to comply with a collective bargaining agreement.

(End of provision)

**52.237-9 Waiver of Limitation on Severance Payments to Foreign Nationals.**

As prescribed in 37.113-2(b), use the following clause:

**WAIVER OF LIMITATION ON SEVERANCE PAYMENTS  
TO FOREIGN NATIONALS (OCT 1995)**

(a) Pursuant to 10 U.S.C. 2324(e)(3)(A) or 41 U.S.C. 256(e)(2)(A), as applicable, the cost allowability limitations in FAR 31.205-6(g)(3) are waived.

(b) This clause may be incorporated into subcontracts issued under this contract, if approved by the Contracting Officer.

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**37.200 Scope of subpart.**

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
This subpart prescribes policies and procedures for acquiring advisory and assistance services by contract. The subpart <del>regulates these contracts with individuals and organizations for both personal and nonpersonal services.</del>	This subpart prescribes policies and procedures for acquiring advisory and assistance services by contract. The subpart <b>applies to</b> contracts <b>whether made with individuals or organizations that involve either</b> personal or nonpersonal services.

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**37.201 Definitions.**

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<del>“Advisory and assistance services” means services, other than those excluded or exempted in this subpart, to support or improve agency policy development, decision-making, management, and administration, or to support or improve the operation of management systems.</del>	“Advisory and assistance services” means <b>those</b> services <b>provided under contract by nongovernmental sources</b> to support or improve: <b>organizational</b> policy development; decision-making; management and administration; <b>program and/or project management and administration; or R&amp;D activities.</b>

[NOTE: Following from old 37.203]

~~Advisory and assistance services may take the form of information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance. These services consist of—  
(a) *Individual experts and consultants.* Individual experts and consultants are persons possessing special, current knowledge or skill that may be combined with extensive operational experience. This enables them to provide information, opinions, advice, or recommendations to enhance understanding of complex issues or to improve the quality and timeliness of policy development or decision-making.~~

**It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature). In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations. All advisory and assistance services are to be classified in one of the following definitional subdivisions:**

—(e) *Management and professional support services.* Management and professional support services take the form of advice, training, or direct assistance for organizations to ensure more efficient or effective operations of managerial, administrative, or related systems. This summary description is operationally defined in terms of the following criteria:

—(1) *Objective.* To ensure more efficient or effective operation of management support or related systems by providing advice, training, or direct assistance associated with the design or operation of such systems.

—(2) *Areas of application.* Management support or related systems such as program management, project monitoring and reporting, data collection, logistics management, budgeting, accounting, auditing, personnel management, paperwork management, records management, space management, and public relations.

—(3) *Outputs.* Services in the form of information, opinions, advice, training, or direct assistance that lead to the improved design or operation of managerial, administrative, or related systems. This does not include training which maintains skills necessary for normal operations. Written reports are normally incidental to the performance of the service.

—(b) *Studies, analyses, and evaluations.* Studies, analyses, and evaluations are organized, analytic assessments needed to provide the insights necessary for understanding complex issues or improving policy development or decision-making. These analytic efforts result in formal, structured documents containing data or leading to conclusions and/or recommendations. This summary description is operationally defined by the following criteria:

—(1) *Objective.* To enhance understanding of complex issues or to improve the quality and timeliness of agency policy development or decision-making by providing new insights into, understanding of, alternative solutions to, or recommendations on agency policy and program issues, through the applications of fact finding, analysis, and evaluation.

—(2) *Areas of application.* All subjects, issues, or problems involving policy development or decision-making in the agency. These may involve concepts, organization, programs and other systems, and the application of such systems.

—(3) *Outputs.* Outputs are formal structured documents containing or leading to conclusions and/or recommendations. Data bases, models, methodologies, and related software created in support of a study, analysis, or evaluation are to be considered part of the overall study effort.

(a) Management and professional support services, *i.e.*, **contractual services that provide assistance, advice or training for the efficient and effective management and operation of organizations, activities (including management and support services for R&D activities), or systems.** These services are normally closely related to the basic responsibilities and mission of the agency originating the requirement for the acquisition of services by contract. Included are efforts that support or contribute to improved organization of program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, **performance auditing, and administrative/ technical support for conferences and training programs;**

(b) Studies, analyses and evaluations, *i.e.*, **contracted services that provide organized, analytical assessments/ evaluations in support of policy development, decision-making, management, or administration. Included are studies in support of R&D activities. Also included are acquisitions of models, methodologies, and related software supporting studies, analyses or evaluations; or**

~~—(d) *Engineering and technical service.* Engineering and technical services (technical representatives) take the form of advice, training, or, under unusual circumstances, direct assistance to ensure more efficient or effective operation or maintenance of existing platforms, weapon systems, related systems, and associated software. All engineering and technical services provided prior to final Government acceptance of a complete hardware system are part of the normal development, production, and procurement processes and do not fall in this category. Engineering and technical services provided after final Government acceptance of a complete hardware system are in this category except where they are procured to increase the original design performance capabilities of existing or new systems or where they are integral to the operational support of a deployed system and have been formally reviewed and approved in the acquisition planning process.~~

(c) **Engineering and technical services, i.e., contractual services used to support the program office during the acquisition cycle by providing such services as systems engineering and technical direction (see 9.505-1(b)) to ensure the effective operation and maintenance of a weapon system or major system as defined in OMB Circular No. A-109 or to provide direct support of a weapon system that is essential to research, development, production, operation or maintenance of the system.**

**“Covered personnel,” as used in this subpart, means—**

**(a) An officer or an individual who is appointed in the civil service by one of the following acting in an official capacity; (1) the President; (2) a Member of Congress; (3) a member of the uniformed services; (4) an individual who is an employee under 5 U.S.C. 2105; (5) the head of a Government-controlled corporation; or (6) an adjutant general appointed by the Secretary concerned under 32 U.S.C. 709(c).**

**(b) A member of the Armed Services of the United States.**

**(c) A person assigned to a Federal agency who has been transferred to another position in the competitive service in another agency. [FAC 90-33]**

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## **37.202 Exclusions.**

### **37.204 Exclusions.**

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
The following activities and programs are excluded or exempted from the definition of advisory or assistance services: —(c) ADP/Telecommunications functions and related services that are controlled in accordance with 41 CFR Part 201, the Federal Information	The following activities and programs are excluded or exempted from the definition of advisory or assistance services: <b>(a) Routine Federal information processing services unless they are an integral part of a contract for the</b>

Resources Management Regulation.

**acquisition of advisory and assistance services.**

—(a) Activities that are reviewed in accordance with the OMB Circular A-76, Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government.

(b) Architectural and engineering services as defined in Part 36.

(b) Architectural and engineering services as defined in **the Brooks Architect-Engineers Act (Section 901 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 541).**

(d) Research on theoretical mathematics and basic medical, biological, physical, social, psychological, or other phenomena.

(c) Research on theoretical mathematics and basic research involving medical, biological, physical, social, psychological, or other phenomena.  
[FAC 90-33]

—(e) Engineering studies related to specific physical or performance characteristics of existing or proposed systems.

—(f) The day-to-day operation of facilities (e.g., the Johnson Space Center and related facilities) and functions (e.g., ADP operations and building maintenance).

—(g) Government-owned, contractor-operated (GOCO) facilities. However, any contract for advisory and assistance services other than the basic contract for operation and management of a GOCO shall come under the definition of advisory or assistance services.

—(h) Clinical medicine.

—(i) Those support services of a managerial or administrative nature performed as a simultaneous part of, and nonseparable from specific development, production, or operational support activities. In this context, nonseparable means that the managerial or administrative systems in question (e.g., subcontractor monitoring or configuration control) cannot reasonably be operated by anyone other than the designer or producer of the end-item hardware.

—(j) Contracts entered into in furtherance of statutorily mandated advisory committees.

—(k) Initial training, training aids, and technical documentation acquired as an integral part of the lease or purchase of equipment.

—(l) Routine maintenance of equipment, routine administrative services (e.g., mail, reproduction, telephone), printing services, and direct advertising (media) costs.

—(m) Auctioneers, realty brokers, appraisers, and surveyors.

—(n) The National Foreign Intelligence Program (NFIP).

—(o) The General Defense Intelligence Program (GDIP).

—(p) Tactical Intelligence and Related Activities (TIARA).

—(q) Foreign Military Sales.

—(r) Engineering and technical services as set forth in 37.203(d).

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**37.203 Types of advisory and assistance services.** [FAC 90-33]

[Contents merged with the definition in 37.201 above]

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**37.203 Policy.**

**~~37.202 Policy.~~**

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*FAR as of FAC 90-25*

*FAR as revised*

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(d) **Limitation on payment for advisory and assistance services. Contractors may not be paid for services to conduct evaluations or analyses of any aspect of a proposal submitted for an initial contract award unless—**

(1) **Neither covered personnel from the requesting agency, nor from another agency, with adequate training and capabilities to perform the required proposal evaluation, are readily available and a written determination is made in accordance with 37.204;**

(2) **The contractor is a Federally-Funded Research and Development Center (FFRDC) as authorized in Section 23 of the Office of Federal Procurement Policy (OFPP) Act as amended (41 U.S.C. 419) and the work placed under the FFRDC's contract meets the criteria of 35.017-3; or**

(3) **Such functions are otherwise authorized by law. [FAC 90-33]**

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**37.204 Guidelines for determining availability of personnel. [FAC 90-33]**

(a) **The head of an agency shall determine, for each evaluation or analysis of proposals, if sufficient personnel with the requisite training and capabilities are available within the agency to perform the evaluation or analysis of proposals submitted for the acquisition.**

(b) **If, for a specific evaluation or analysis, such personnel are not available within the agency, the head of the agency shall—**

(1) **Determine which Federal agencies may have personnel with the required training and capabilities; and**

(2) **Consider the administrative cost and time associated with conducting the search, the dollar value of the procurement, other costs, such as travel costs involved in the use of such personnel, and the needs of the Federal agencies to make management decisions on the best use of available personnel in performing the agency's mission.**

(c) **If the supporting agency agrees to make the required personnel available, the agencies shall execute an agreement for the detail of the supporting agency's personnel to the requesting agency.**

(d) **If the requesting agency, after reasonable attempts to obtain personnel with the required training and capabilities, is unable to identify such personnel, the head of the agency may make the determination required by 37.203.**

(e) An agency may make a determination regarding the availability of covered personnel for a class of proposals for which evaluation and analysis would require expertise so unique or specialized that it is not reasonable to expect such personnel to be available.

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**37.205 ~~Management controls.~~** [FAC 90-33]

~~—OMB Circular A-120 requires each agency to establish procedures for a written evaluation at the conclusion of the contract to assess the utility of the deliverables to the agency and the performance of the contractor.~~

**37.205 Contracting officer responsibilities.**

**37.207 ~~Contracting officer responsibilities.~~**

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>The contracting officer <del>is responsible for determining whether any requested contractual action, regardless of dollar value, constitutes advisory and assistance services as described in this subpart. The contracting officer's determination shall be final. Before processing any contractual action for advisory and assistance services, the contracting officer shall verify that—</del></p> <p><del>—(a) Action is taken to avoid conflicts of interest in accordance with Subpart 9.5;</del></p> <p><del>—(b) The applicable requirements of this subpart and 37.103 and 37.104 are met;</del></p> <p><del>—(c) The services being contracted for consist only of the types of services defined at 37.203;</del></p> <p><del>—(d) The request includes a statement of need and certification by the requesting official (see 37.206(a) and (b)); and</del></p> <p><del>—(e) Written approval for the requirement, including requests for contract modifications beyond the scope of the acquisition originally approved, has been obtained from the appropriate level(s) (see 37.206(e)).</del></p>	<p>The contracting officer <b>shall ensure that the determination required in accordance with the guidelines at 37.204 has been made prior to issuing a solicitation.</b></p> <p>[FAC 90-33]</p>

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**37.206 ~~Requesting activity responsibilities.~~** [FAC 90-33]

~~Requests for advisory and assistance services shall include—~~

~~—(a) A statement certifying that the requirement is for advisory and assistance services as defined in this subpart.~~

~~—(b) Written justification of need and certification that such services do not unnecessarily duplicate any previously performed work or services.~~

~~—(c) Written approval for such services by an official at a level above the requesting office. However, in the case of requirements received by the contracting officer during the fourth quarter of the fiscal year, for award during the same fiscal year, the approval at the second level, or higher level if required by agency procedures, above the requesting office shall accompany the request for contract action.~~

~~—(d) Properly chargeable funds certified by the cognizant fiscal/budget office.~~